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IN THE

Supreme Court of the United States

October Term No. ~~1396~~ 166
1967

THOMAS KAPATOS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK A. LOPEZ,
Attorney for Petitioner,
Office & Post Office Address,
133 Schermerhorn Street,
Brooklyn, New York 11201.
Tel.: 212—625-4387

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IN THE

Supreme Court of the United States

October Term No. .....

THOMAS KAPATOS,

Petitioner,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the adjudication of the United States Court of Appeals for the Second Circuit rendered on March 15, 1967.

Opinions Below

On March 15, 1967, the Court of Appeals, Second Circuit, unanimously affirmed the judgment rendered by the original court with no opinion. The opinion of the trial court is set forth in the appendix.

Jurisdiction

The affirmance of the Court of Appeals, Second Circuit, was made on March 15, 1967. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1254 (1); 28 U.S.C. Section 876; 28 U.S.C. Section 877.[1] An extension of time was extended to and including May 13, 1967 by Justice John M. Harlan.

Statute Involved

TITLE 18, U.S.C. SECTION 659

659. Interstate or Foreign Baggage, Express or Freight —State Prosecutions.—Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Questions Presented

1. Was the evidence insufficient as a matter of law as to require the trial Court to render judgment of acquittal pursuant to Rule 29 (a)?

2. Was it error for the appellate court below not to have reversed because the evidence was insufficient to sustain the verdict?

3. Was the evidence concerning the principal issue of identification at such variance and conflict in conjunction with other grave constitutional infirmities as to offend due process of law of the Fifth Amendment of the U. S. Constitution?

4. Was the surreptitious confrontation identification procedure, under the circumstances, violative of the due process of law clause of the Fifth Amendment?

5. Was the doctrine expounded in *Miranda* v. *Arizona*, 384 U.S. 436, applicable to the constitutional encroachment at the surreptitious confrontation identification procedure?

5(a) Was it offensive to due process of law to wilfully deny a fair procedural line-up when the opportunity for such a line-up was manifestly available?

6. Was it offensive to due process of law within the Fifth Amendment and the confrontation clause of the Sixth Amendment of the U. S. Constitution when the prosecution stated unequivocally the existence of facts concerning which no evidence has been introduced?

Statement

On January 14, 1966, Indictment 66 Cr. 34, containing two counts, was filed against the petitioner, Thomas Kapatos. Petitioner was arrested on January 17, 1966.

Count One charges that on November 8, 1963, the petitioner Kapatos stole an interstate shipment of jewelry in violation of Title 18 United States Code, Section 659. Count Two alleged a conspiracy charge relative to Count One.

Trial commenced on October 3, 1966. At the conclusion of the Government's case, counsel for Kapatos motioned for judgment of acquittal on both counts of the indictment (T.R. 305, 306).* The motion was denied as to the substantive count; and in respect to the conspiracy count, the motion was granted (T.R. 306).

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* Reference to page numbers of Stenographic Typewritten Copy of Trial Record.

At the conclusion of the trial, counsel for Kapatos renewed the motion in respect to the substantive count for a judgment of acquittal on the grounds that there is insufficient evidence on the question of fact to go before the jury so that they need not speculate as to the guilt of the defendant. The motion was perfunctorily denied (T.R. 395).

Upon a verified petition sworn to on October 10, 1966, counsel for Kapatos submitted a motion for a new trial and arrest of judgment. Said petition was denied by opinion. See, Exhibit A.

On October 28, 1966, the Hon. Edward Weinfeld, U. S. D. C. Judge, sentenced petitioner Kapatos to imprisonment for a term of seven and one-half years. Kapatos is presently serving the sentence in the Federal Penitentiary at Atlanta, Georgia.

The U. S. Court of Appeals, Second Circuit, affirmed the judgment of conviction unanimously on March 15, 1967.

Summary of Facts Pertinent to the Constitutional Irregularities

Cognizant of the principle that the evidence must be considered in the light most favorable to the government, the testimonial facts are illustrated.

The Government's Case

On November 8, 1963, in the vicinity of 41st Street between 11th and 12th Avenues in Manhattan, at approximately 12:30 p.m., a station wagon, operated by the AAA Messenger Service, containing a quantity of jewelry, was proceeding from 32 West 47th Street and destined for 93 Nassau Street, Manhattan. Some of the jewelry was ultimately destined for interstate delivery. Seated in the station wagon were six messengers. In the front seat were

seated the driver, Louis Moots, next to him and in the center was Victor Figueroa, and on the extreme right was Max Kreisman. In the rear seat were Rudy Tretta, directly behind the driver, Louis Moots, John White, seated in the middle and on the extreme right behind Max Kreisman was Tom Savoca.

The seating arrangement is undisputed.

As the station wagon proceeded west of 41st Street, they were stopped by a black sedan, containing two men. The driver and the passenger were dressed as policemen.[1] The black sedan was parallel to the station wagon, about three feet apart. The pseudo policeman emerged from the passenger seat of the black sedan, stopped twelve inches from Moots' window, bent down slightly, and ordered everyone out. Moots had inadvertently stalled the station wagon, and the policeman admonished him. The six messengers were ushered into a small panel truck, which had replaced the black sedan which moved forward.[2] The panel truck, containing the six messengers, two masked robbers and the unmasked robber driver, drove for several blocks; and John White observed that when the panel truck stopped, he noticed that the black sedan had been following. The three robbers left the panel truck and made their getaway in the black sedan. The crime was perpetrated by five bandits.

The policeman left behind endeavored to drive the station wagon away. He had difficulty. He then emerged from the station wagon and proceeded west. He then accosted James Raymond Mullet, who was a witness for the Government. The policeman endeavored to obtain assistance from James Raymond Mullet but was rejected.

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[1] Max Kreisman was the only witness, who testified that the driver of the black sedan was dressed in a police uniform.

[2] There is no testimony concerning where the black sedan went to at this juncture of the crime episode.

The above is a skeleton outline of the Government's case. There is no dispute that the above events transpired.

The crime occurred at 12:30 p.m. on November 8, 1963.

James Francis McGerald, a police detective, testified for the defendant. On November 8, 1963, he was assigned to the instant crime (T.R. 364). He spoke to each member of the AAA Jewelry Messenger Service, who was in the station wagon that was robbed (T.R. 365). He recorded the description of the policeman, who had emerged from the black sedan and approached the station wagon. He took it as a consensus of all the messengers (T.R. 368). He said:

> "A. I have it as No. 1, white male, 38 to 40 years old, 5 foot 11, over 200 pounds, *fair complexion,* wearing a police uniform, a winter blouse with initials on his lapel, S.P. He had a white shield with a black pistol."

He had shown photographs to the victims of the robbery two weeks after the commission of the crime (T.R. 365). He had received photos from various places, and he would give the photos to Larry Orbach, in charge of the office of the AAA Messenger Service at 93 Nassau Street, "because the messengers were always en route." He gave Orbach the photos and in two or three days, he would return and receive negative answers. He looked at the petitioner, Kapatos, and stated that he had shown the photo of Kapatos to the messengers (T.R. 366). He particularly showed the photo of Kapatos because he was informed by higher authority that Kapatos was considered a suspect (T.R. 366, 367). The failure to identify Kapatos' photo by the messengers eliminated him as a suspect by the N. Y. C. Police Department.

Edwin Peter Krieger, Special Agent of the Federal Bureau of Investigation, was called by the defendant. On

November 8, 1963, he was assigned to report to the 14th Precinct at W. 30th Street in connection with a jewel robbery. He interviewed Max Kreisman. He made a report and testified:

> "A. Kreisman stated that the individual dressed as a policeman was a white male, 35 to 40 years old, and that the other individuals wore masks and another one had on sunglasses. They were all described as white males, 30 to 40 years old, and one of the individuals was wearing blue coveralls and stripes. He was unable to furnish a more detailed description of the perpetrators" (T.R. 336).

Robert L. Monroe, Special Agent of the F.B.I., was assigned on November 8, 1963 together with Special Agent Krieger in connection with the jewel robbery.

His report indicated that he had spoken to Max Kreisman:

> "A. Kreisman stated that the individual dressed as a policeman was a white male, 35 to 40 years old. * * * He was unable to furnish a more detailed description of the perpetrators."

These aforesaid, apparently disinterested witnesses, merely testified as to what their records reflect on November 8, 1963, when they interviewed the victims of the robbery.

On November 18, 1965, Max Kreisman saw the petitioner Kapatos on Delancey Street underneath the Williamsburg Bridge at the site at which Kapatos was employed in construction. This prior identification introduced on direct by the Government was vigorously objected to by counsel which was overruled (T.R. 37). He was brought to this area by two F.B.I. Agents.

In November of 1965, Victor Figueroa, on direct testimony stated when he and Louis Moots were brought by two agents of the F.B.I. (T.R. 119):

> "The day they took me to recognize him, I only can say that the day they took me to recognize him it seems to me that he was very much alike to that man who stop us" (T.R. 120).

REASONS FOR GRANTING THE WRIT

POINT I

At the conclusion of the Government's case, in the light most favorable to the Government, the District Court should have granted petitioner's motion for a judgment of acquittal pursuant to Rule 29a upon the ground that the evidence adduced was insufficient, as being inextricably in conflict as to unequivocally demonstrate a reasonable doubt.

This Court has reversed judgments on the ground that the evidence was not sufficient to sustain the verdict. *Wilborg* v. *U. S.*, 163 U.S. 632, 16 S. Ct. 1127; *Clyatt* v. *U. S.*, 197 U.S. 207, 25 S. Ct. 429. Upon a similar ground this Court reversed a judgment that the defendants be discharged. *France* v. *U. S.*, 164 U.S. 676, 17 S. Ct. 219.

This case centers exclusively upon identification evidence. In this posture the Government's case in that area is illustrated at this juncture.

Max Kreisman identified Kapatos as the perpetrator who emerged from the passenger seat of the black sedan that stopped three feet in parallel to the station wagon. He identified him in Court on *October 3, 1966* and, in a surreptitious confrontation on Delancey Street under the Williamsburg Bridge on *November 18, 1965*, while being accompanied by two federal agents, Kreisman testified that at 12:30 p.m. on *November 8, 1963*, when the station wagon

proceeded down 41st Street they were stopped by a black sedan containing two men. The black sedan stopped three feet alongside and a man fully dressed in a police uniform emerged from the passenger seat, stopped 12 inches from Moots, who was the driver, pointed a pistol and ordered the occupants to leave the station wagon. The policeman bent over a little bit to look into the station wagon. The driver of the black sedan was also dressed in a police uniform, but Kreisman did not get too good a look at him. Moots had inadvertently stalled the station wagon and was reprimanded by the policeman. He did not see the color of the hair or eyes of the policeman. He was ushered out and observed the *policeman at the door,* who ordered him into a panel truck that had replaced the black sedan. There were an additional two masked men and an unmasked driver of the panel truck, who participated in the robbery. He was seated at the extreme right of the front seat and did not observe where the black sedan had gone.

Victor Figueroa was seated in the front center. At the point in issue at 41st Street, he testified that someone with a police uniform ordered them to stop the station wagon (T.R. 114, 115). When questioned whether he saw the man who was driving the black sedan, he said, "No, because he was covering him with his body" (T.R. 116). The man dressed in a police uniform ordered the station wagon to stop. Figueroa turned his face and looked to the other side (T.R. 116). He only saw the policeman when he gave the order to stop. He then saw two men with masks order Moots to get out of the station wagon. In Court he looked at Kapatos and said, "It seems to me that he looked like that man" (T.R. 118). In *November of 1965,* in the company of Louis Moots and two federal agents, he identified Kapatos on Delancey Street underneath the Williamsburg Bridge in a surreptitious confrontation. On cross-examination, he testified that Moots got out first and he followed. *There was a masked man at the door who ordered him into the panel truck* (T.R. 137). He only saw the policeman

when they were ordered to stop. He never saw him anymore (T.R. 136).

John White at 12:30 p.m. on November 8, 1963, was seated in the center of the rear seat. He saw the black sedan and a man dressed in a police uniform order them to pull over. *The policeman walked over to the driver's seat and then walked around the front of the station wagon to the right side where Max Kreisman was seated and then drew a gun* (T.R. 148, 149). Two masked men came from the rear and ordered them out. He was ushered into a black panel truck and handcuffed to the seat. *They drove several blocks and the three culprits left the truck and ran to the rear where they* entered a black sedan (T.R. 152, 160, 161, 162). He testified in Court that the man dressed as a policeman "looked similar" to the policeman he saw (T.R. 152). In *December of 1965* in the company of F.B.I. Agents, he identified Kapatos as the policeman he saw on November 8, 1963, at a surreptitious confrontation in front of the Homestead Restaurant on the West Side of New York City. He said: "I looked at him and he fits the description of the policeman" (T.R. 154, 155).

Louis Moots was the driver of the station wagon. He was signalled to pull over by someone dressed in a police uniform. It was a black sedan. He turned to the other messengers in the station wagon and asked them, "What did I do?" When he turned around, the police officer had a gun pointing in the window at him (T.R. 174). The station wagon stalled and the policeman reprimanded him. He got right out of the car and was ordered into the panel truck (T.R. 175). He looked at Kapatos and said: "* * * there is one person that I think looks like him, but I am not sure" (T.R. 178).

On cross-examination he testified that the policeman was sitting in the car when he was told to pull over. "I

assumed it was a police officer and I obeyed the law." He turned around and inquired of his co-workers, "Well, what did I do?" (T.R. 188). When questioned whether he could give any particular identification of the driver of the black sedan who drove alongside of the station wagon, he said: *"No, I couldn't see him"* (T.R. 193).

Rudy Tretter was seated on the rear left seat behind Moots. He heard the command "Pull over" and thought he saw a patrolman (T.R. 200). If he saw the person dressed as a policeman, he would not be able to recognize him (T.R. 204). A masked man ordered him into a panel truck. The black sedan moved out of the way for the panel truck, but he did not see where the black sedan went (T.R. 208). Larry Orbach, the manager at the AAA Messenger Service at Nassau Street, had shown him photographs of suspects; and he was unable to identify any of the photographs (T.R. 211). He further testified regarding the policeman, *"I just noticed he was walking around the station wagon"* (T.R. 216).

Thomas Savoca was seated on the extreme right on the rear seat. An unmarked black sedan cut them off. Instructions were shouted to keep his head down. The door was opened at his right and a man in a Halloween mask showed him a pistol and urged him to get out at his left side; and he was directed to enter into a panel truck where he was handcuffed to a wooden strip on the panel (T.R. 223). He could not identify the man dressed in a police uniform (T.R. 225).

James Raymond Mullet testified for the Government. On November 8, 1963, he was employed by the Associated Wreckers as an iron worker foreman. After lunch, between 12:30 p.m. and 1:00 p.m., he was sitting in his car on the south side of 41st Street half way between 11th Avenue and

West Street, pointing west, talking to one of his co-workers (T.R. 289). His name was Daniel Carey.

> "A man dressed in a policeman's uniform walked up to my car and asked if either one of us knew how to drive a standard shift car?" (T.R. 290).

The policeman asked him to help. He said, "Yes." It was an old station wagon. The policeman said, "I can't seem to get it going." He gave him some instructions; and when asked to get in the station wagon to show him, he declined and backed away. Whereupon he observed the policeman stay in the station wagon for a few more seconds and then got out and walked west toward West Street. The policeman was about 5 foot 10 and 6 feet, weighed between 180 and 200 pounds and well-built with short-cropped red hair. He was not wearing a hat and there was blue dye on his forehead and his face was red (T.R. 292). He looked at Kapatos and when asked if he was the man he saw in the station wagon, he responded, "No" (T.R. 293).

On cross-examination, he testified that he was in the area five or 10 minutes. He did not see a black sedan or any panel truck. He walked over to the station wagon with the policeman. Kapatos stood up in Court. He said that the man he saw was taller, heavier, better built than Kapatos. That the policeman he saw had red hair (T.R. 296).

Counsel for Kapatos then made the following motion (T.R. 305):

> "Mr. Lopez: With your Honor's permission, at this time the defendant, at the close of the Government's case, moves for judgment of acquittal on both counts of the instant indictment, on ground that the Government's evidence in the instant case is insufficient to support either count.
>
> The Court: The motion is denied as to the substantive count. Mr. Gold, with respect to the con-

spiracy count, don't you think the motion should be granted?

Mr. Gold: I would agree, your Honor.

The Court: The motion is granted as to the conspiracy count."

The Government's opening statement recites a pertinent assertion of proof (T.R. 13):

> "You are going to hear evidence that five men participated in this robbery. You will learn that all but one of these men departed immediately from the scene of the robbery. I have already told you that two masked men and the driver of the panel truck went away with the six messengers from AAA. That left the two men dressed as policemen.
>
> You will learn that the man who stayed with the station wagon, the man who was dressed as a police officer, was not the man who originally got out and ordered the station wagon to stop, but was the driver of that unmarked car also wearing a policeman's uniform.
>
> It was, apparently, his job to drive the station wagon and its contents away. You will learn that he was not successful in doing that.
>
> There is only one man on trial before you, and that is the defendant Thomas Kapatos, who is seated on the extreme right. He will be identified as the person who dressed as a police officer ordered the station wagon to stop and then alighted from that car and drew a pistol and ordered these people out of that station wagon."

There was no other evidence exclusive of the identification account presented by the Government. The record is devoid of any feasible explanation why two years elapsed

before the federal agents subjected Kapatos to a surreptitious identification confrontation notwithstanding that Kapatos was considered a suspect two weeks subsequent to the crime on November 8, 1963.

It is a reasonable assumption that substantial discrepancies vitiate a fair evaluation of the essential fact finding processes for the jury. The evidence of identification within the realm of the Government's case and the concomitant circumstances surrounding its credibility under critical analysis inescapably illuminates a concrete reasonable doubt within the purview of the doctrine enunciated in *Hammond* v. *U. S.*, 75 U.S. App. C. 397, 127 F. 2d 752.

Kreisman, in a tightly fit position, seated on the extreme right front seat, wedged in by Figueroa and Moots, stated that he saw the driver of the black sedan and that he was dressed as a policeman. He gave no further description. It is even speculative as to whether the driver was white or colored.

Figueroa seated next to Kreisman testified that he could not see the driver of the black sedan. Neither can Moots, who was in the most advantageous position, relate that he could observe the driver of the black sedan.

There is absolutely no testimony that the driver of the black sedan ever emerged from his position. White observed the black sedan following behind the panel truck and saw the three robbers enter the black sedan to make their escape.

It is inconceivable that an acceptable conclusion can be made upon a microscopically obscure inference that the *driver* of the black sedan was observed and conversed with Mullet.

Kreisman says that when he followed Figueroa in leaving the station wagon, the policeman was at the door, with pistol in hand, ordered him into the panel truck.

However, Figueroa states that when he emerged from the station wagon, an armed, masked man urged him into the panel truck, and he did not see the policeman.

White testified that the policeman stopped at Moots' window and then proceeded around the front of the station wagon until he reached the window where Kreisman was seated, and then removed and displayed a pistol. He apparently corroborates Figueroa.

Tretta testified that he saw the policeman walking around the station wagon.

Kreisman saw the policeman as he slightly bent over to peer into the station wagon, and saw him as he was ordered to leave the station wagon.

Figueroa testified that he saw the policeman when he was seated in the passenger seat and raised his hand and announced, "Pull over." He never saw the policeman afterwards. He promptly turned his head away as he thought the policeman genuine. In this apathy, in a brief moment, two years later on the site where Kapatos was employed, accompanied by Moots and two federal agents, he identified Kapatos as being the policeman who ordered his vehicle to stop. At the trial, he vacillated and said:

> "It seems to me that he looked like the man" (T.R. 118).

This dubious identification should have no probative value for any purpose.

Moots was ordered to stop and he promptly turned to his co-workers and said: "What did I do?" When he turned around he saw a gun pointed at him. He was immediately ushered into the panel truck. At the trial he

testified regarding whether he could identify anyone who had participated in the robbery:

> "Well, yes, there is one person that I think looks like him, but I am not sure" (T.R. 178).

The person referred to was Kapatos. Three years after the incident he makes this observation in Court. He, too, turned away with indifference.

White, in December of 1965, identified Kapatos in front of the Homestead Restaurant on the West Side. He was accompanied by two federal agents. At the trial he looked at Kapatos and said:

> "I see a man who looks similar to the policeman" (T.R. 152).

Mullet, who was not a victim of the robbery, a Government witness, had an extraordinary vantage point in seeing and talking to the man dressed in a police uniform. Comparatively, he observed the policeman a considerable period. The policeman had removed his hat. The policeman did not resemble Kapatos; he had a short crop of red hair, red faced, taller, heavier and better built than Kapatos.

In substance, succinctly presented, is the Government's case on the issue of identification constituting the only evidence tending to connect Kapatos with the crime charged against him.

It is respectfully contended that in this posture alone the evidence adduced by the government is inextricably in conflict necessitating that the motion to dismiss be granted in the interest of fundamental justice.

The discrepancies, the time element, opportunity and the unquestionable exculpatory testimony by the Government cannot be resolved adversely to Kapatos without speculation, surmise and conjecture.

It is apparent that a grievous mistake had been made among the messengers. It cannot be argued that it is within the realm of the jury to speculatively disseminate the obvious conflict of testimony on the most crucial issue involving the circumstances of the identification.

Disinterested and credible evidence by the defense discloses further aggravating circumstances depicting the vice of the Government's case.

The Defense

Daniel Carey was an assistant foreman to Mullet, and he was sitting in the car with him on W. 41st Street when the man dressed in a police uniform approached them. He described the policeman as having no hat, his hair was red and crew cut. He looked at Kapatos and said that he was not the man dressed in a police uniform that approached him on November 8, 1963 (T.R. 318). He further stated that the man he saw differed from Kapatos as being bigger, more robust and that his age was in the late thirties (T.R. 319).

Philip Joseph Rossi, a structural steel worker, was on the site at W. 41st Street on November 8, 1963, testified that he was within five feet of the policeman who had approached Mullet and Carey. He looked at Kapatos and said that he was not the man he saw dressed as a policeman. The man he saw differed from Kapatos in that he was much broader, huskier, had red hair and was about 38 years of age. The policeman he saw had blue eyes and had a perfect set of teeth, as opposed to Kapatos who opened his mouth in Court and exposed an irregular set of teeth (T.R. 322, 323).

Sam Manesses, was self-employed, selling frankfurters on W. 41st Street about 1:00 p.m. on November 8, 1963. He saw a policeman come out of a car; the car was in motion

and uncontrolled struck the sidewalk and stopped. The policeman walked by him at about five feet from where he was standing. He looked at Kapatos and said that he was not the man. The man he saw was taller, thinner and had red hair.

Daniel Parness had a clothing store on 362 West 42nd Street, Manhattan. He was in his store on November 8, 1963, and at about 6:00 p.m. a man entered wearing a blue uniform and purchased a jacket. The man spent approximately five minutes in his store. He later noticed a newspaper headline that there was a jewel robbery on 41st Street and 10th Avenue. He contacted a friend, who was a chief investigator for the district attorney's office in Brooklyn. Thereafter he was visited by a detective. He looked at Kapatos and stated that he was not the man he saw in his store wearing a blue uniform. On cross-examination by the prosecution, he stated that if he saw the man, he thinks he can identify him. He described the man he saw as having very heavy black hair, about 5 feet 5 or 6 inches tall, very heavy set about 210 to 220 pounds.

Edwin Peter Krieger and Robert L. Monroe, both assigned to the F.B.I., worked together in the investigation of the instant case. Their recorded reports disclose that the man dressed as a policeman, who approached the station wagon was between 35 to 40 years of age and was *fair complexioned. They were unable to furnish a more detailed description of the perpetrators.*

James Francis McGerald was a detective assigned to the jewel robbery on November 8, 1963. He interviewed the messengers on November 8, 1963. A few weeks after the crime, he showed a photograph of Kapatos to the messengers of the AAA Jewelry Messenger Service, the victims of the crime (T.R. 366). Kapatos was a suspect; and when he received a negative response to the photograph of him, he no longer considered him suspect. He recorded the de-

scription concerning the man dressed as a policeman, who approached the station wagon on November 8, 1963, ordering it to stop."

The consensus of opinion among the messengers was that the person dressed as a policeman was a white male, 38 to 40 years old, 5 foot 11, over 200 pounds, fair complexioned and wearing a police uniform with the initials S.P.

At the conclusion of the trial counsel moved for a judgment of acquittal on the grounds that there is insufficient evidence on the question of fact to go before a jury so that they need not speculate as to the guilt of Kapatos. The motion was denied (T.R. 395).

During summation the prosecution reiterated (T.R. 427):

> "And I think the Government has proved beyond any doubt whatever that the man that Rossi and Carey and the vendor were looking at was the red-headed man who was undoubtedly the other man in this robbery."

Counsel for defense prior to summation moved the Court (T.R. 396):

> "I would ask the Court to ask Mr. Gold not to comment on that particular aspect of his opening in which he said that the policeman who approached the vehicle is the policeman who switched, the man who drove up——
>
> The Court: No statement by you or the prosecution is evidence. All right, I will take it."

The Court in his charge regarding the gratuitous and fallacious statement by the prosecution that the Government "has proved beyond doubt that the man Rossi and

Carey and the vendor were looking at was the red-headed man who was undoubtedly the other man in this robbery," stated:

> "The Government, in reply contends that there was another policeman, another man in a policeman's uniform in the black sedan—the driver—and that the defendant's witnesses were describing that individual and not the one who left the passenger side of the unmarked car with the drawn gun."

During deliberation the jury returned after sending in a request that they have the testimony of the AAA Messengers pertaining to the portion which identifies or lack of identification of the defendant (T.R. 455). Testimony regarding the identification was read to them at great length. Again the jury sent the Court a note (T.R. 468) saying, "Direct and cross-examination of all six AAA Messengers on the identification or lack of identification of the defendant." The reading included the prior identification (T.R. 469).

The jury's inquiries were lengthy concerning all aspects of the identification concerning only the messengers. Their questions appeared to indicate that they were in doubt and confused in the area of the messengers' identification. The prosecution's devastatingly fallacious assertions that the driver of the black sedan was the policeman that Mullet, Carey, Rossi and the vendor had seen, apparently persuaded the jury.

Critical Analysis of the Fatal Discrepancies

A man dressed in a police uniform, including a police hat, is seen emerging from a black sedan on November 8, 1963. The black sedan stops parallel to the AAA station wagon three feet away. The pseudo policeman pulls out a gun, stops 12 inches from the driver of the station wagon,

slightly peers in and orders everyone out and into a panel truck. Kreisman, seated at the extreme right in the front, emerges and is promptly placed in the panel truck. Two years later he is brought by federal agents to Delancey Street under the Williamsburg Bridge to view the defendant, Kapatos, and in court testified that Kapatos was the man dressed in a police uniform who approached the station wagon, armed, on November 8, 1963. Kreisman was the only witness who testified that the driver of the black sedan wore a police uniform.

Victor Figueroa, when he saw the pseudo policeman thought he was actually a policeman and turned his head away. He only saw the policeman when he raised his hand and gave the order to stop. Three years later in the courtroom, he identified Kapatos as the policeman he saw for a moment. Under cross-examination, he was not positive. In November of 1965, together with Moots and two F.B.I. Agents he was confronted with Kapatos in a suggestive identification procedure. Figueroa testified:

> "The day they took me to recognize him (defendant), I only can say that the day they took me to recognize him it seems to me that he was very much alike to that man who stop us."

John White saw the policeman emerge from the black sedan walk over to Moots and then walked around the station wagon by way of going around the front and when the policeman reached the door where Kreisman was seated he drew a gun. He identified Kapatos as the "man who looks similar to the policeman." He was taken by federal agents in December of 1965, where he identified Kapatos in front of the Homestead Restaurant on the West Side.

Moots was the driver and when he saw the policeman order him to stop, he merely thought he may have com-

mitted a traffic violation. When he turned back toward the window, he saw the policeman with gun in his hand and he was ordered out of the station wagon and promptly ushered into the panel truck. In a momentary observation, he testified, referring to Kapatos, "* * * there is one person that I think looks like him, but I am not sure."

Rudy Tretta and Thomas Savoca, saw the policeman but could not identify him.

Mullet saw the policeman without a hat and his hair was short and red. He looked at the defendant and said that he was not the man in the police uniform. Daniel Carey, Philip Joseph Rossi, and Sam Manessis saw the policeman, without his hat, leaving the station wagon and all testified that Kapatos was not the policeman and that the policeman had red hair.

Federal Agents, Edwin Peter Krieger, Robert L. Monroe and Detective James McGerald testified that they interviewed the AAA messengers who were the victims of the robbery on November 8, 1963, and based upon their records, the consensus among the messengers was that the policeman who emerged from the black sedan and approached the station wagon was between 30 and 40 years of age and had a fair complexion.

Kreisman identified the defendant Kapatos under adverse circumstances as being the man dressed in a police uniform who participated in a robbery on November 8, 1963. Victor Figueroa, John White and Louis Moots are doubtful but hold that Kapatos looks like the man. Ironically, Kreisman, Figueroa, White and Moots were taken to a certain area where Kapatos was exposed to them in a suggestive identification procedure by the federal agents.

The government knew that Mullet, Carey, Rossi and Manessis saw the same policeman with his hat off and he

did not resemble Kapatos. Nowhere is this more dramatically manifested than in the testimony of the Government's own witness Mullet who testified that the F.B.I. asked him whether Kapatos was not the man who could not drive the stick-shift in the AAA station wagon. This disappointing discrepancy could not be reconciled by the government unless the red-headed man was someone else. It was obvious that it was the same man dressed in a police uniform and that Kapatos was absolutely innocent.

The federal agents Kreiger and Monroe, as well as Detective McGerald, who recorded the description given to them by the messengers on November 8, 1963, testified that the description given substantially corresponds with the description given by Mullet, Carey, Rossi and Manessis. The one distinction being that the latter four observed the policeman with his hat removed and that he had a crew cut and his hair was red. No one in the former group had ever observed the policeman with his hat removed.

The five messengers and the five other witnesses who saw the man dressed in a police uniform had seen the same man. The record is completely devoid of a scintilla of evidence in contradiction. In this posture alone the court should have directed an acquittal.

The trial did not consist of any other evidence of any material value concerning the substantive charge against Kapatos. The case was solely within the realm of diversified descriptions of the man the government contends was the defendant Kapatos. The apparent incongruity in the identification in its entire context, coupled with the government's sophistry and deception and the federal agents' wilful activity in subjecting Kapatos to a suggestive identification procedure and purposefully depriving defendant of a fair line-up after having Kapatos under surveillance as a suspect for almost two years, violated the spirit of "due process of law" in this case.

In the Court below counsel submitted a requested supplementary charge which was rejected by the Court, which stated:

Request No. 2

"The Court may take judicial notice of public acts, places, facts and events which the Court regards as matters of common knowledge. When the Court states that it takes judicial notice of a particular fact, the jury must regard that fact as included in the evidence and proven. In this regard the Court takes judicial notice that there is nothing unusual about the size and general appearance of the defendant Kapatos."

The fact is that Kapatos is an ordinary man, 51 years of age, swarthy complexion, 5′ 9″, 180 lbs., and of Greek extraction. His hair is dark and there is nothing unusual or prominent concerning his facial characteristics. In Eye-Witness Identification in Criminal Cases by Patrick Wall, there are innumerable case histories and case law citing the perils of eye-witness identification involving grave miscarriages of justice. The instant case presents circumstances and situations that compel extreme caution and judicial hesitancy in allowing jury deliberation.

There is evidence that Kapatos' photograph was given to Larry Orbach a few weeks after the crime for the express purpose of showing this photo to the AAA messengers, who were the victims of the robbery that occurred on November 8, 1963. That the photo was returned with a negative response.

Two years later some of the messengers were literally brought to view Kapatos at the place of his employment. Preceding such suggestive identification procedure photos of Kapatos were shown to the messengers.

The conflicting identification disclosed that Kapatos was unlikely the man dressed in a police uniform who emerged from the driver's seat of the black sedan and approached the station wagon, failed in his endeavor to start it, frustrated, walked away.

Implicit in the government's preparation of this case lurks the evil of convicting the innocent.

Kreisman was the only witness to testify that he observed two men dressed in police uniforms in the front seat of the black sedan. However, he could not describe the driver. When the black sedan pulled up alongside of the station wagon, Kreisman, who was seated on the extreme right in the front seat, heard, "Pull over," and then saw a man dressed in a police uniform emerge from the black sedan, walk three feet and stopped one foot from Moots. He did not look at the black sedan again. He lost complete sight of it (108). It is evident that he had a momentary glimpse of the black sedan. *Figueroa* could not see the driver of the black sedan. Moots, who was the driver of the station wagon, testified that he could not see the driver of the black sedan nor could he see if the driver was dressed as a policeman (193, 194). Kreisman testified that the policeman who emerged from the passenger seat of the black sedan ordered him into the panel truck (33). Figueroa testified that he only saw the policeman when he gave the order to stop. That the two masked men ordered them to get out of the station wagon (117, 135). Moots testified that the policeman was at the door when he was ordered to leave the station wagon. However, *White* testified that he saw a policeman in the black sedan and heard him say, "Pull over there." Then saw the policeman walk to where Moots was sitting then walked around the front of the station wagon to the other side where Kreisman was sitting and then drew a gun (148, 149). *Tretta* testified that he saw a man in a police uniform with an "S.P." on the collar (202). When he got out of the vehicle he did not see the

policeman at the door (209). That he saw the policeman walking around the station wagon with an "S.P." insignia on his collar. *Savoca* saw the policeman, but could not identify him. A man with a mask showed him a pistol, and ordered him out of the station wagon and into a van.

It is significant that the report made to F.B.I. Agent Kreiger by Kreisman specifically relates that there was one policeman involved in the crime (T.R. 336).

These inconsistencies cannot be termed innocuous. They are in a critical area and the central issue of this case. Kreisman was not in an adequate position to effectively observe the attire the driver of the black sedan was wearing. When the man dressed in a police uniform emerged from the car, Kreisman's observation was completely blocked. Kreisman was in a poor position to adequately observe the policeman who emerged from the black sedan, walked three feet and stopped one foot from Moots. If Figueroa and White are to be believed, then Kreisman did not see the policeman when he was ordered out of the station wagon. Tretta corroborates White when he testified that he saw the policeman walk around the station wagon. The conflicting testimony is irreconcilable and the fact situation was ethereal. The fatal discrepancies in the identification were originally observed by the government and the government resorted to an ingenious scheme and pretentiously urged that the driver of the black sedan was the pseudo policeman that endeavored to drive away the station wagon and was observed by Mullet, Carey, Rossi and Manessis. The government gambled on this theory and won, but the victory was predicated upon chicanery. A conviction thus obtained is inimical to due process of law.

This Court has the authority and jurisdiction to reverse the conviction when the evidence adduced at the trial, in totality, with the aforesaid constitutional infirmities, offends the basic principle of "due process of law" and the trial

Court below abused its discretion by failing to grant counsel's timely and appropriate motion for a verdict of Judgment of Acquittal. *Gargotta* v. *U. S.*, 1935, 77 F. 2d 977; *Nicola* v. *U. S.*, 1934, 72 F. 2d 780; *Grant* v. *U. S.*, 49 F. 2d 118; *Graciffo* v. *U. S.*, 46 F. 2d 852; *Parnell* v. *U. S.*, 64 F. 2d 324; *Leslie* v. *U. S.*, 43 F. 2d 288; *Nosowitz* v. *U. S.*, 282 F. 2d 575; and *Romano* v. *U. S.*, 9 F. 2d 522.

Issues of fact resolved adversely by jury verdict have been reversed in cases involving confessions in the absence of "that fundamental fairness essential to the very concept of justice." *Lisinba* v. *Calif.*, 314 U. S. 219, 86 L. ed 166, 62 S. Ct. 280. In fact situations determined by jury verdict in entrapment defense this Court reversed in *Sorrello* v. *U. S.*, 287 U. S. 435, 77 L. ed 413, 53 S. Ct. 210; *Sherman* v. *U. S.*, 356 U. S. 369, 2 L. ed 2d 848, 78 S. Ct. 819.

POINT II

The Government's fallacious argument in the opening and summation that the man dressed in a police uniform who drove the black sedan, was the man, who tried to drive the station wagon and was observed by James Raymond Mullet, Daniel Carey, Philip Joseph Rossi, Sam Manessis and Daniel Parness, was constitutionally improper and violative of the procedural due process of law clause of the Fifth Amendment of the U. S. Constitution.

It is an error of a constitutional magnitude that during the opening and closing argument, government counsel repeatedly stated as facts matters which were not established by evidence. *DeVore* v. *U. S.*, 368 F. 2d 396, 399, (1966). Rule 22 Canons of Professional Ethics.

None of the six (6) AAA messengers, who were the victims of the robbery, could give any description concerning the driver of the black sedan, who allegedly wore a police uniform. In fact, there is no evidence adduced at

the trial even remotely describing the driver of the black sedan. No one observed the driver leaving his vehicle. It is solely within the realm of speculation, surmise and conjecture to state that the driver of the black sedan had emerged from his position during the crime.

In appraising the situation concerning the crime, we must view the picture in the light of common sense. The perpetrators of the crime apparently had a plan of operation. It was to be done expeditiously with means for a prompt "getaway." An objective view presents the following scene, amply supported by the testimony adduced at the trial; a black sedan, containing two men dressed in police uniforms, cuts off the station wagon with six (6) messengers and a quantity of valuable jewelry. The first man on the scene is the policeman, who emerged from the passenger seat of the black sedan. The black sedan pulls down to make way for a panel truck containing three (3) more robbery accomplices. They promptly emerge to assist the policeman usher out the AAA messengers and direct them all into the panel truck and drive off. It was White, who observed the black sedan following the panel truck. As the three (3) men ran from the panel truck, the black sedan was waiting to aid them in their getaway. The policeman left behind had the elementary duty to drive the station wagon with the jewelry to a certain destination.

There was no design for delay. The policeman, who originally emerged from the black sedan, ushered the AAA messengers into the panel truck, endeavored to start the station wagon, frustrated, removed his hat, and approached Mullet, was observed by Carey, Rossi, Manessis and perhaps Parness. Mullet, of all the witnesses, was at the best vantage point to observe the policeman who could not start the car, and was the same policeman who approached the AAA station wagon, and at gun point ordered the messengers out and into the panel truck. Mullet saw him with his hat off and casually spoke with him. He

unequivocally testified that Kapatos was not the man dressed in a police uniform.

The witnesses Mullet, Carey, Rossi, Manessis and Parness, collectively testified that Kapatos was not the man dressed in a police uniform that they had observed.

The Government was unable to reconcile the description given by the messengers, which seemed to contradict the observers who were approached by the policeman. Therefore, to resolve the discrepancy, the Government resorted to deception and specious argument. The Government counsel fallaciously argued in summation:

> "And I think the Government has proved beyond any doubt whatever that the man that Rossi and Carey and the vendor were looking at was the red-headed man, who was undoubtedly the other man in this robbery."

Ironically, there was not a scintilla of evidence remotely substantiating his contentions.

The fact is that there is a basic consistency that gives support to defendant's position, and the weight of evidence favors defendant Kapatos overwhelmingly.

F.B.I. Agents Krieger and Monroe supported by Detective McGerald and conceded by the Government in summation, disclosed documentary records that the man, dressed in a police uniform who approached the AAA station wagon, was between 30 and 40 years of age, as indicated by the messengers of the AAA who were the victims of the robbery. Detective McGerald's report states that the consensus of opinion among the AAA messengers was that the said policeman was fair complexioned. It follows that everyone who observed the policeman, excluding Parness, estimates the age of 30 to 40 years old, and having a fair complexion.

All the messengers were very nervous, particularly Max Kreisman. The crime episode had occurred in seconds. Observation was inadequate for an accurate identification. However, when the policeman removed his hat, after being frustrated in his endeavor to drive the station wagon away, he did not even resemble the defendant Kapatos. No messenger testified they saw the policeman without his hat on. Kreisman did not see the color of his hair because he wore a hat. White testified that his hair was white and sort of grey, he could only see the sides of his head.

There is no credible evidence to establish that the policeman, who emerged from the passenger seat of the black sedan, approached the AAA station wagon, with gun in hand ordered the messengers out, was not the same man who failed to drive the station wagon away, approached Mullet and was seen by Carey, Rossi and Manessis.

The Government's gratuitous and fallacious argument irreparably violated defendant's right to a fair and impartial trial, as contemplated by the due process of law clause of the Fifth Amendment of the U. S. Constitution. The issue of fact was vitiated and the taint precluded fair deliberation by the jury.

Rule 22 of the Canons of Professional Ethics proscribes in part, "* * * in argument to assert as a fact that which has not been proved." The government in the instant case ignored this ethical proscription and vigorously pursued it in his summation before the jury.

The jury apparently was persuaded by the Government's fallacious and devastatingly prejudicial argument that the red-headed policeman was not the policeman that had approached the station wagon, armed, and ushered the messengers of the AAA into a panel truck. After brief deliberation, the jury sent a note to the Court stating: "May we have the testimony of the AAA messengers?" In

the Court's charge to the jury, the Court marshalled the government's position and omitted to admonish the jury that there is no testimonial evidence to even remotely support the government's position. It is significant that the government utterly failed to prove a vital aspect of his opening address to the jury. He stated:

> "You will learn that the man who stayed with the station wagon, the man who was dressed as a police officer, was not the man who originally got out and ordered the station wagon to stop, but was the driver of that unmarked car also wearing a policeman's uniform."

Counsel below in a requested supplementary charge, which the Court rejected in its substance, stated:

Request Number Three

> "I charge you not to consider as evidence U. S. Attorney's opening statement, 'that you will learn that the man who stayed with the station wagon, the man who was dressed as a police officer, was not the man who originally got out and ordered the station wagon to stop, but was the driver of that unmarked car also wearing a policeman's uniform,' since it, the statement, has not been supported by the evidence adduced from the witness stand."

Before the summations of counsel commenced, counsel for appellant made the following request (page 396):

> Mr. Lopez: This is my last request, your Honor. Coupled with the defendant's supplemental request No. 3, I would ask the Court to ask Mr. Gold not to comment on that particular aspect of his opening in which he said that the policeman who approached the vehicle is the policeman who switched, the man who drove up——

The Court: No statement by you or the prosecution is evidence. All right, I will take it.

Mr. Lopez: By commenting——

The Court: I made that clear at the beginning, neither your statement nor his statement are to be taken as evidence. All right, I will take it."

Fundamental justice cannot sanction unquestionable and positive assertions upon an intangible and obscure inference residing in the realm of speculation and conjecture. The Government introduced the testimony of Mullet and was bound by its credibility. The circumstances of this case amply demonstrate that Mullet observed the same man the messengers testified had been attired in a police uniform and was in the passenger seat of the black sedan, ordered them to stop, emerged and approached the station wagon.

U. S. v. *Spangelet,* 258 F. 2d 238:

"It is well settled that the jury's consideration in a case should be limited to those matters actually brought out in evidence and that summation should not be used to put before the jury facts not actually presented in evidence."

The principles enunciated in *Berger* v. *U. S.,* 295 U. S. 78, are directly applicable to the instant case.

The prosecution has the duty to refrain from improper methods calculated to produce a wrongful conviction, *Viereck* v. *U. S.,* 318 U. S. 236; *Berger* v. *U. S.,* 295 U. S. 78, and while he may strike hard blows, he is not at liberty to strike foul ones, *Rose* v. *U. S.,* 180 F. 2d 160; *U. S.* v. *Netti,* 121 F. 2d 927. He is required to follow principle alone, without bias or prejudice, and he must rest his case on evidence, not epithet. *U. S.* v. *Kravitz,* 281 F. 2d 581. It is his duty to see that truth and right shall prevail, and not merely to secure a conviction or to win a case. *U. S.* v.

Zborowski, 271 F. 2d 661; *U. S.* v. *Keenan*, 267 F. 2d 118; *Handford* v. *U. S.*, 249 F. 2d 295; *U. S.* v. *Levi*, 177 F. 2d 827. In 23 (A) C.J.S. Section 1094, it held:

> "It is improper for counsel to comment on matters not sustained by the evidence, or to state his own knowledge of the facts, or to insinuate he has such knowledge."

There must be a basis of fact for the assertions of counsel, *Pritchett* v. *U. S.*, 185 F. 2d 438. Accordingly, it is improper for the prosecuting attorney, in his argument, to assert or to refer to facts and circumstances as being in the case where they are not reasonably shown by the evidence. *Wagner* v. *U. S.*, 263 F. 2d 877; *Graham* v. *U. S.*, 257 F. 2d 724.

> "It is misconduct for prosecutor to state or infer the existence of facts concerning which no evidence has been introduced."

A. The conduct of the prosecution as outlined hereinabove was violative of the Sixth Amendment of the U. S. Constitution guarantee secured by the confrontation clause thereof.

The Supreme Court said in *Mattox* v. *United States*, 156 U.S. 237, 242-243:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits * * * being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." 156 N. Y. 237, 242-243.

See, also Five Wigmore Evidence Sections 1365, 1397 (3d ed. 1940); *State* v. *Hester,* 137 S. C. 145, 189, 134 S. E. 885, 900 (1926).

The prosecutor by considered choice assumed the function of an unsworn witness in this case. In the first instance in his opening statement and ultimately in his summation to the jury in an effective, but invidious method of explaining fatally glaring inconsistencies from the original theory of the prosecution and the evidence adduced at the trial contradicting such theory. Such conduct constitutes a constitutional abrogation of the right of confrontation guaranteed to every accused by the Sixth Amendment to the U. S. Constitution. The prosecutor's baroque approach left Kapatos bereft of any opportunity to cross-examine him (the prosecutor), as to the "reliability" of his "unsworn" testimony.

There is no evidence in this case that the pseudo police officer who approached the AAA station wagon and who ushered the messengers into the panel truck is not the same man who eventually abandoned the station wagon occasioned by his apparent inability to operate a standard shift vehicle.

There is no evidence that this man is not the same man who Mullet, Carey, Rossi and Manessis observed abandoning the station wagon and who each unequivocally testified *was not* the defendant Kapatos.

Nevertheless, in summation, in a desperate but admittedly successful ploy to save the day for the Government all basic precepts of a prosecutor's duty to refrain from resort to unethical maneuvers in order to succeed in obtaining a conviction were totally disregarded.

Notwithstanding the utter lack of any evidence to even remotely support his view, the prosecutor "testified" in summation, at the very minimum with the implicit permis-

sion of the trial Court, over the defendant's expressed pre-summation request of a Court direction interdicting such illegal argument that:

> "Now there were two cops there and it's perfectly obvious that one had red hair and it was short-cropped and that he had some kind of a blue dye running down his face. And that's the man that Mullet saw, that's the man that Rossi saw, that's the man that Carey saw, and that's the man that the frankfurter vendor saw" (p. 421).
>
> * * * * *
>
> "And I think the Government has proved *beyond any doubt whatever* that the man that Rossi and Carey and the Vendor were looking at was the red-headed man who was undoubtedly the other man in this robbery" (p. 427).

In *Douglas* v. *Alabama,* 380 U. S. 415, *Douglas* and an alleged accomplice were tried separately in state court for assault with intent to murder. The alleged accomplice was called as a state witness in petitioner's trial but repeatedly refused on self-incrimination grounds to testify.

Under the guise of cross-examining the accomplice as a hostile witness, the prosecutor, over petitioner's objections and despite the accomplice's continuing refusal to answer, read in the presence of the jury the latter's purported confession which implicated the petitioner. Three law enforcement officers then identified the document as the confession signed by the accomplice though *it was not offered in evidence.*

The Supreme Court in reversing *Douglas'* conviction held that petitioner's inability to cross-examine the alleged accomplice about the purported confession, the prosecutor's reading of which may well have been treated by the jury as substantial and cogent evidence of guilt, denied petitioner

the right of cross-examination secured by the confrontation clause of the Sixth Amendment to the U. S. Constitution.

In the case at bar, as in the *Douglas* case, the defendant Kapatos was totally without any means of cross-examining the trial prosecutor relative to his perpendicular, though unsworn testimony, inasmuch as in the technical sense his summation was not evidence but as in the *Douglas* case, the jury could have, and probably did, treat it as substantial and cogent evidence of guilt. The prejudice here is certainly equal to the prejudice suffered by *Douglas*. The Supreme Court relied heavily upon this Court's decision in *U. S.* v. *Maloney*, 262 F. 2d 535, 537 (1959) for the result reached in *Douglas* [380 U. S. at 419].

> "Since the Solicitor was not a witness, the inference from his reading that Lloyd made the statement could not be tested by cross-examination." 380 U. S. at 419.

In this case although the prosecutor read from no third party statement as in the *Douglas* case, the jury may very well have *inferred* that the prosecutor had in his possession certain *private evidence* not disclosed for some ethereal reason to the jury, supporting such unsubstantiated theory of a "switch" by the pseudo policemen.

The jury's acceptance of this unsupported, constitutionally untested, certainly unsworn summation testimony of the prosecutor, which they ostensibly did, illegally minimized the Government's burden of establishing the guilt of the defendant beyond a reasonable doubt by virtue of the fact that in one fell-swoop the prosecutor through his forensic misconduct disposed of a glaring inconsistency in his case without which in all probability any cosmopolitan jury would have concluded it had a reasonable doubt as to the guilt of the defendant.

Our research has failed to unearth a case factually comparable which has considered and decided the Sixth Amendment issue at bar.

It is our submission, however, that the prosecutor's conduct in the instant case was as violative of the Sixth Amendment guarantee of confrontation as the conduct of the state prosecutor in the *Douglas* case.

This case probably presents that different Sixth Amendment argument envisioned by Mr. Justice Harlan, concurring in the result in *Pointer* v. *Texas*, 380 U. S. 400, and which prompted the following observation:

> "While either of these constitutional approaches brings one to the same end result in this particular case there is a basic difference between the two in the kind of future constitutional development they *portend*." 380 U.S. at 408.

This case presents the opportunity for a natural extension of the Sixth Amendment guaranty of confrontation insuring the accused of a much fairer, constitutional trial.

POINT III

The prior show-up suggestive identification procedure under the circumstances was a flagrant violation of the "due process of law" clause of the Fifth Amendment to the U. S. Constitution.

Two weeks after the commission of the robbery on November 8, 1963, Kapatos was considered a suspect by the New York City Police. Photos of Kapatos were given to Larry Orbach to present to the messengers, who were the victims of the robbery. The photos were returned with negative results. Kapatos was no longer a suspect by the New York City Police. The F.B.I. agents continued with

the case. In November of 1965, the Federal Agents brought Kaminsky to Delancey Street underneath the Williamsburg Bridge where he identified Kapatos. This was presented by the Government on direct evidence and submitted to bolster the in court identification. Witnesses Figueroa and Rivera testified on direct that they were brought by Federal Agents to Delancey Street underneath the Williamsburg Bridge. Figueroa testified:

> "The day they took me to recognize him, I only can say that the day they took me to recognize him it seems to me that he was very much alike to that man who step on."

White testified that he was brought to the West Side and identified Kapatos in front of the Bloomingdale Restaurant. This, too, was on direct. However, at trial, White testified, "I see a man who looks similar to the policeman." He referred to Kapatos. The prior identification was objected to.

The testimony as to what took place at the show-up identification procedure was best be aptly illustrated by the Government witness White on cross-examination, as follows:

> "Q. Will the F.B.I. ever show you a photograph of the defendant Kapatos?
>
> A. Yes, they did, but at the time I didn't know it was Kapatos.
>
> * * * * *
>
> Q. From the time they had me look at him in the street, then they told me that they had showed me the photograph several weeks earlier.
>
> * * * * *
>
> Q. They took me down on the south side of the Williamsburg Bridge, where there was a jail going on there at the time that he was working.

Q. Did any of these particular agents ever ask you specifically was Kapatos the fellow who couldn't drive the stick shift?

A. Yes.

• • • • •

Q. When you were brought down to Delancey Street, you were again asked when you saw Kapatos if he was the man who couldn't drive the stick shift?

A. That's correct."

Kapatos was a target suspect for a considerable period. The federal agents had apparently showed Kapatos' photograph to the messengers preceding the show-up identification.

Kapatos was under surveillance and the Federal Agents constantly knew where he could be located. The evidence adduced at the trial discloses that Kreisman, Figueroa, Moots and Mullet were taken to view Kapatos on Delancey Street, underneath the Williamsburg Bridge. White was taken to the area around the Homestead Restaurant to view Kapatos.

The Federal Agents were well aware that they were on the threshold of the accusatory stage when they brought the witnesses to surreptitiously view Kapatos at the site of his employment. Kapatos was intentionally deprived of the universally inherent right to a fair and impartial line-up procedure. No circumstances existed compelling a show-up identification. Mullet clearly portrays the suggestive identification procedure employed in this case. The surreptitious identification procedure, under the circumstances, violated the spirit of fairness exemplified by due process of law. The Federal Agents could have readily provided Kapatos a fair line-up. Apparently such procedure was not desired in this case. It is a regrettable policy of the F.B.I. to attempt a suspect a fair line-up when available. The opinion to accord Kapatos a fair line-up was patently

unfair and the error attained the stature of a constitutional magnitude when the government presented as evidence in chief that Kapatos was previously identified. Why did the F.B.I. eliminate their usual indispensable policy to accord a suspect a fair and impartial line-up in this case? There was no material evidence remotely connecting Kapatos with the commission of the crime.

Identification was the paramount issue. To insure society and defendant that the identification be made in an atmosphere of fairness it was incumbent upon the Federal Agents to grant Kapatos a fair line-up.

Under the aegis of the F.B.I., persuaded by a suggestive identification procedure, Figueroa and White identified Kapatos and in court, under oath, they were not sure. The peril of a suggestive, surreptitious confrontation procedure seems self-evident. *Eye-Witness Identification in Criminal Cases by Patrick Wall* (p. 27), strongly condemns the show-up identification procedure, citing *People* v. *Conley,* 275 A. D. 743. *People* v. *Geraci,* 254 A. D. 155, is directly apposite to the instant case.

In *U. S.* v. *Denno,* 255 F. 2d 731, the majority upholding a show-up identification procedure because of the extraordinary circumstances, held apropos herein:

> "Since court room identification, which usually takes place many months after the occurrence of the crime, is permissible, interests of the accused and society alike demand that the opportunity to identify be afforded at the earliest possible moment when the likelihood of an accurate identification is greatest. Of course, in the interests of truth and fairness to the suspect, this opportunity should be afforded, where possible, under circumstances most likely to lead to a disinterested decision by the identifier. When a proper moment exists will of necessity be

> dependent upon the facts and circumstances of each particular case. No ironclad rules can be or should be laid down."

The prior identification testimony presented by the Government on direct effectively bolstered the in court identification and certainly contributed to the conviction. Kapatos was unquestionably denied the fundamental right, under the circumstances, to a fair constitutional line-up. The gravamen of the error herein was much more flagrant than in *Wade* v. *U. S.*, 358 F. 2d 557.

It is further emphasized that the Government had the obligation to appraise the legal tenebility of the apparent suggestive identification procedure and in the interest of fundamental justice, should have rejected its probative value. However, its revelation depicts the unreliability of the in court identification. Kreisman identified Kapatos in court predicated upon the suggestive identification procedure in November of 1965, on Delancey Street under the Williamsburg Bridge when he was brought to view Kapatos. Documentary evidence by Agents Krieger, Monroe and Detective McGerald discloses ample grounds substantiating the theory herein advanced that the prior identification procedure egregiously tainted the legal propriety of the in court identification.

The show-up identification procedure had been condemned by English Courts almost sixty years ago in Smith, 1 Crim. App. R. 203 (1908):

> "Such methods as were resorted to in this case make this particular identification nearly valueless, and police authorities ought to know that this is not the right way to identify."

Police procedural administration regulating specific standards for line-up process for suspects of crime are not statutory in the federal code. The line-up process in the

federal system is regulated in accordance with fair play. It is a policy administrative function and invariably a line-up conducted in a reasonably fair manner is accorded to a suspect when available. The essence of fair play exemplified by due process of law mandates a proper line-up where the victim can select a suspect from a group similar to each other in certain characteristics. An improper or no line-up can often result in a grave miscarriage of justice. The in court identification can be a shame and a pretense if a previous identification is made in an unfair atmosphere. Where the sole evidence is exclusively in identification, the process of prior identification is of paramount significance. A corrupt, prior identification can irreparably taint the in court identification and the defendant is foreclosed from a fair and impartial trial. A constitutional approach to this issue is indispensable to due process of law. The case of *Wade* v. *U. S.*, 358 F. 2d 557 and *U. S.* v. *Denno*, 255 F. 2d 731, and *Jesse James Gilbert* v. *Calif.*, No. 1600 Misc. are presently before this Court dealing with another aspect of pretrial identification procedure.

There are certain situations where a denial of a line-up does not come within the dimension of a constitutional infringement. A victim of a crime can fortuitously encounter a suspect; knowing the perpetrator; in crimes where the suspect is apprehended in the presence of the victim; there may be other peculiar situations where a line-up was not feasible at the time.

However, where a consistent policy of a line-up procedure exists, it is a grave constitutional deprivation to discriminate against a suspect by wilfully eliminating a fair line-up.

In this case a line-up was imperative to due process of law. Kapatos was a suspect for a considerable period. Federal Agents were aware of his place of employment. They brought several victims to surreptitiously view him. They simply ignored a constitutionally inherent policy of according a suspect a fair and impartial line-up.

The line-up concept is an organ of a monumental import and universally considered as an integral part of our criminal administrative procedure. Our citizenry accepts such procedure as a fundamental requirement. It is abhorent to our sense of fair play when this right is capriciously abrogated.

We cannot sanction the whimsical rejection of a fair line-up to a suspect by police authority. There must be proper standards consonant with the concept of due process of law.

In this case Kapatos was exposed to a surrepitious suggestive identification procedure. There was no line-up and the federal agents circumvented the existing line-up policy.

There is no case that the author could find regarding the clarification of appropriate line-up procedure by this Court. The need for such standards are as imperative as *Mapp* v. *Ohio,* 367 U.S. 643, 81 S. Ct. 1684; *Escobedo* v. *U. S.,* 378 U.S. 478, 84 S. Ct. 1758; *Gideon* v. *Wainwright,* 372 U.S. 335.

If a defendant is identified in court upon a prior unfair exposure identification, then our sacred jury trial system is a farce and a mockery. The wilful omission to accord Kapatos a fair line-up where such policy prevails is, "of a wrong so fundamental that it must make the whole proceedings a mere pretense of a trial and render the conviction wholly void." *Brown* v. *Miss.,* 297 U.S. 278.

A. The positive identification of Kapatos by Kreisman triggered the accusatory stage. It required that Kapatos receive the aid of counsel in all subsequent confrontations with his accusers.

The other show-up identification confrontations that took place after, laid the foundation for Kapatos' conviction as surely as responses to extra-judicial interrogation.

The result of the show-up identification confrontation, like those of interrogation, might well "make the trial no more than an appeal" from the uncounseled confrontation between appellant and prosecutor. *Escobedo* v. *Illinois*, 378 U.S. 478 at 487.

The show-up identification confrontation of Kapatos did critically effect the outcome of the trial. *Wade* v. *United States*, 358 F. 2d 557 (5th Cir. 1966).

The record as a whole clearly shows that Kapatos was systematically deprived of counsel advise by government agents and the confrontation identification of Kapatos was the product of their illegal activity. The Kreisman and other show-up identification should not have been admitted into evidence at trial for "testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies" *Wong Sun* v. *U. S.*, 371 U. S. 477, 485.

In respect to Judge Weinfeld's opinion on the issue concerning the prior identification situation, when Kreisman identified Kapatos, such identification did indeed "trigger the accusatory stage" (P. 7). It is evident that when Kreisman identified Kapatos as the pseudo policeman who approached the station wagon on November 8, 1963, armed, there were sufficient grounds for a lawful arrest. The omission to make the arrest should not militate against Kapatos' right to counsel in respect to the show up identification procedure by the other victims of the crime. The F.B.I. agents, after two years of surveillance of Kapatos, finally put a specific plan in operation. Witnesses were personally transported by the F.B.I. agents to a locale where Kapatos was employed and surreptitiously confronted them with Kapatos. Kreisman identified Kapatos and the accusatory stage emerged from the investigatory stage. At this juncture Kapatos was entitled to certain constitutional privileges. *Escobedo* v. *Illinois*, 375 U. S. 478 (1964); *Wade* v. *United States*, 358

F. 2d 557 (5th Cir. 1966). The two-year period which the F.B.I. agents worked on the case gave them ample time to properly accord Kapatos the fundamental right to a fair line-up and accusatory notice so that Kapatos could retain counsel to effectively represent him.

Kapatos' need for counsel in deciding whether to condition his participation or refuse to participate at all was especially acute in view of the prior exposure to Kapatos' photograph of all the witnesses—all had examined pictures of Kapatos over a period of several years.

The right to counsel is not limited to situations in which the privilege against self-incrimination is at stake. *Miranda* v. *Arizona,* 384 U. S. 436, 465 N. 35. The matters held to require the advise of counsel in *Hamilton* v. *Alabama,* 368 U. S. 52, 53-54, did not relate to self-incrimination. See *U. S. ex rel. Stovall* v. *Denno,* 355 F. 2d 731 at 743 (*Friendly,* J., dissenting).

As noted, the rationale of the Supreme Court's decisions in this area is that preservation of the substance of the right to public trial with the assistance of counsel requires that the right to counsel be extended to all confrontations between the Government and the accused during the course of the prosecution which may critically affect the outcome.

It is not enough to say that an accused is required to do no more at a lineup that he could be compelled to do at trial. At trial he has a lawyer, at counsel's request a judge might order the segregation of identification witnesses, and take other appropriate steps to enhance the fairness and reliability of the identification testimony.

In order to make the deterrent of the exclusionary rule fully effective Kapatos was entitled to the assistance of counsel at these show-up identifications—counsel's duty would be to stop directly the products of unconstitutional police activity.

If Kapatos had counsel, it would have prevented indirectly what the police may not do directly.

To countenance the challenged conduct of the F.B.I. in this case would amount to announcing an effective legal devise by which certain over-zealous members of law enforcement can readily circumvent the salutary rule of *Escobedo* v. *Illinois, supra,* and *Miranda* v. *Arizona, supra.*

CONCLUSION

The issues herein advanced have been presented in the Court below. For the foregoing reasons the petition for the issuance of a writ of certiorari should be granted in the interest of substantial justice.

FRANK A. LOPEZ,
Attorney for Petitioner,
Office & Post Office Address,
133 Schermerhorn Street,
Brooklyn, New York 11201
Tel.: 212—625-4387

APPENDIX

APPENDIX

(Opinion by Weinfeld, D.J.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Cr. 34

#32881

UNITED STATES OF AMERICA,

—against—

THOMAS KAPATOS,

Defendant.

APPEARANCES:

HON. ROBERT M. MORGENTHAU
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York
Attorney for United States of America

JAY GOLD, ESQ.
Assistant United States Attorney
Of Counsel

FRANK A. LOUIS, ESQ.
THEODORE [illegible], ESQ.
[illegible]
Brooklyn, New York
Attorneys for Defendant

EDWARD WEINFELD, D. J.

The defendant, following his conviction of a hijacking at gunpoint of an interstate shipment of jewelry, moves for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, and for arrest of judgment under Rule 34.

The motion, in one aspect, charges the government with "suppression of evidence." It was brought about by a somewhat extravagant statement made by the Assistant United States Attorney in the heat of post-trial atmosphere when he moved to remand the defendant pending sentence. The assistant then stated:

> " . . . this case could have been a lot stronger if we had one more witness, and that witness was murdered one year ago, and I have every reason to believe that he (the defendant) murdered him."

Prior to trial the United States Attorney furnished defense counsel the names of witnesses the government did not intend to call "who may have information which you may determine to be pertinent to your client's defense." Obviously, the name of the murdered man was not listed. All other witnesses were accounted for upon the trial.

Defense counsel, based upon the Assistant United States Attorney's reference to the murdered man, now seeks "any statement, admissions, confessions, electronic or tape recordings" of the deceased, and "that a fact hearing be held to determine whether there has been suppression of evidence favorable to the defendant which could have changed the verdict."

The motion is predicated upon defense counsel's conclusion that the murdered man "must either be one of the perpetrators or an informant close to the scene," and upon an assumption that (1) he made a statement to govern-

mental authorities, and (2) it contains exculpatory matter or other information which, had it been available to the defense, would have contradicted the theory of the prosecution and bolstered that of the defense.

The government, in resisting this motion, relied upon the insufficiency of the moving papers. However, in addition, the Assistant United States Attorney represented that the government had no statements from the murdered man bearing upon the instant case; that such statements by the deceased as there were referred not to the crime of which this defendant was found guilty, which occurred in November 1963 in New York City, known as the Triple A jewelry holdup, but to an entirely unrelated crime, a hijacking of a bank truck which was committed a year thereafter, in December 1964, in Paterson, New Jersey, and that the government had information upon which it was suspected this defendant, the murdered man, together with others, one of whom was also murdered, were involved. The assistant's explanation for his original reference on the remand motion to the murdered man was that at one time the authorities had hoped to gain his confidence and cooperation relative to the Triple A holdup, but before this could materialize he was murdered.

Notwithstanding the insufficiency of the moving papers, which alone requires denial of the motions, this court required the government to turn over all statements and all interview reports containing statements of the murdered man referred to on the motion to remand, as well as those of the second murdered man to whom reference was first made upon the argument of the current motion. The court has examined these; they contain not a single word or reference either to this defendant in connection with the interstate theft in November 1963 or to any other aspect of this theft. The present motion may properly be catergorized as utterly

unfounded and without the slightest evidential foundation.[1] The statements of the two deceased will be returned to the authorities to be retained by them in the event any appellate or other court hereafter desires to examine them.

Equally without substance is the further contention that the admission in evidence of identification of the defendant two years after the crime and some six or seven weeks before his indictment and arrest in January 1966 abridged his privilege against self-incrimination[2] and his right to counsel.[3] The identifications were the result of observations of the defendant by several of the holdup victims while he was on a public thoroughfare at his place of employment, and on another occasion at a public restaurant. The defendant was not then in custody; the crime was unsolved; no arrests had been made; the matter was still under investigation. The observations were in pursuance of the continued inquiry to identify or perhaps to exonerate alleged par-

---

[1] The defendant's reliance on Campbell v. United States, 365 U.S. 85 (1961) is misplaced. *Campbell* concerns itself with the statements of a government witness who had already testified. At issue was whether documents in the possession of the government were statements within the purview of section 3500 of Title 18 to be turned over to the defense. Here obviously there can be no such issue; we are not concerned with a witness who testified, moreover, the government has delivered to the court for its inspection all documents or reports containing statements of the deceased.

The defendant's reliance on Mitchell v. United States, 368 U.S. 439 (1962, is equally misplaced. *Mitchell* decided that a motion alleging that materially false testimony was used against a defendant upon his trial and supported by a hitherto unoffered affidavit corroborating the defense should have been treated as a motion for a new trial on the ground of newly discovered evidence. The defendant here has so moved under Rule 33, as well as under Rule 34.

[2] See Schmerber v. California, 384 U.S. 757, 761 (1966) (". . . the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . ."); United States ex rel. Stovall v. Denno, 355 F.2d 731, 737-38 (2d Cir.), cert. granted, 16 L.ed.2d 1014 (1966).

[3] United States ex rel. Stovall v. Denno, *supra* n.2, 738-40.

ticipants in the then still unsolved crime—which still remains unsolved as to four other alleged participants. The claim that any constitutional rights of the defendant were violated is without merit.[4]

The motion, insofar as it seeks to set aside the verdict as being against the weight of evidence, is denied. Finally, insofar as the motion rests upon refusal to charge supplemental requests Nos. 1 and 3, it is likewise denied. Apart from the lack of substance to the claim that it was error to decline the requests,[5] no exception was taken to the court's instructions or to its failure to grant specific requests.[6]

The foregoing shall be deemed the entry of an order denying the motion in all respects.

Dated: New York, N. Y.
October 28, 1966

EDWARD WEINFELD
United States District Judge

---

[4] See nn. 2 and 3 *supra*.

[5] As to request number one, see United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964); Escalante v. United States, 228 F.2d 61, 62-3 (5th Cir. 1955); Davis v. United States, 78 F.2d 501 (10th Cir. 1935); Hendrix v. United States, 327 F.2d 971, 974 (5th Cir. 1964); People v. Spinello, 303 N.Y. 193, 203 (1951); People v. Yates, 165 C.A.2d 489, 332 P.2d 314, cert. denied, 360 U.S. 920 (1959); People v. Daly, 168 C.A.2d 169, 335 P.2d 503 (1959).

[6] See Rule 30, Fed. R. Crim. P.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 166

THOMAS KAPATOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty of theft of jewelry in an interstate shipment, in violation of 18 U.S.C. 659 (R. I, 2; R. II, 64a).[1] On October 28, 1966, petitioner was sentenced to imprisonment for 7½ years (R. II, 64a). On March 15, 1967, the court of appeals affirmed the conviction without opinion (R. II, 80a). On April 10, 1967, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including May 13, 1967. The petition for a writ of certiorari was filed on May 17, 1967; it is therefore

[1] The court dismissed count 2, a conspiracy count, at the close of the government's case (R. I, 300).

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out of time under Rules 22(2) and 34(2) of the Rules of this Court. In any event, petitioner raises no issue warranting review by this Court.

1. The government's evidence showed that on November 8, 1963, six messengers of the AAA Jewelry Messenger Service were transporting a load of jewelry in a station wagon to the firm's Nassau Street office in Manhattan (R. II, 2a–5a). As the station wagon was proceeding on West 41st Street near 11th Avenue, it was overtaken on its driver's side by a black sedan. The driver of the sedan and its passenger were dressed in police uniforms (R. II, 6a–8a, 21a–22a). The passenger, with his gun drawn, said, "Get out, this is a holdup," and the six messengers left the station wagon from the left side (R. II, 7a, 8a, 11a, 23a, 28a–29a). At the trial, four messengers identified petitioner as the passenger (R. II, 10a, 15a, 18a–19a, 24a–25a, 29a–30a).[2] As petitioner was ushering the messengers out of the station wagon, a panel truck pulled up with three other men in work clothes, two of whom wore masks and had guns (R. II, 8a–9a, 23a). After the six messengers had been forced into the truck and handcuffed, the driver, with the two masked men accompanying him, drove the truck a few blocks before abandoning it (R. II, 8a–9a, 23a–24a, 29a).

One of the "policemen" had trouble starting the AAA station wagon with a stick shift and asked one Mullett, an ironworker nearby, to help him, but Mul-

[2] Two messengers were unable to identify petitioner as the "policeman" who stopped the station wagon (R. I, 204, 225).

lett said he did not want to get involved. The "policeman" then alighted from the station wagon, walked west toward West Street, and disappeared (R. I, 289–292). Mullett said that this policeman was about 5 feet 10 inches tall, weighed between 180 and 200 pounds, and had short-cropped red hair (R. I, 292). Mullett testified that petitioner was not the policeman he had seen in the station wagon (R. I, 293). There was defense testimony by two ironworkers and a frankfurter vendor that the policeman who had trouble starting the station wagon had red hair and was not the petitioner (R. I, 318, 321, 330).

During 1965, two years after the robbery, three messengers identified petitioner as the robber upon seeing him on the street. One, Kreisman, testified that in November 1965, while in the presence of two F.B.I. agents, he had seen petitioner on Delancey Street underneath the Williamsburgh Bridge and had identified him as one of the participants in the robbery (R. II, 10a–11a). Another, Figueroa, testified that the same month, in the company of Moots (another messenger) and two F.B.I. agents, he had identified petitioner as "very much alike to that man who stop us" (R. II, 19a). The third messenger, White, testified that in December 1965 in the presence of agents he had identified petitioner when he saw him in front of the Homestead Restaurant (R. II, 25a).[4]

In the prosecutor's closing argument he stated:

> Now there were two cops there and it's perfectly obvious that one had red hair and it was

[4] The indictment was returned on January 14, 1966, and petitioner was arrested on January 17, 1966.

> short-cropped and that he had some kind of a blue dye running down his face. And that's the man that Mullett saw, that's the man that Rossi saw, that's the man that Carey saw, and that's the man that the frankfurter vendor saw (R. I, 421).
>
> * * * * *
>
> This is not a question of, is it the cop or the red-headed man? It was the cop and the red-headed man. And they stuck up that station wagon together with two other men who were wearing masks and one rather toothy individual who drove the van away in accordance with Kreisman's testimony (R. I, 424).

Petitioner's contention that the prosecutor was improperly permitted to make this argument, since he was in effect testifying to facts not in the record, is without merit. It is based upon the erroneous premise that there was no evidence of participation in the robbery by the second "policeman," who drove the sedan from which petitioner alighted when he stopped the station wagon. There was, however, explicit testimony by Kreisman that the driver of the black sedan was "also wearing a policeman's uniform" (R. II, 8a). Thus, the prosecutor was justified in stating in his closing argument that there were two policemen—the petitioner and the red-headed driver of the black sedan who had been seen by defense witnesses when he attempted to start the stalled station wagon. This was necessary to refute defense counsel's contention that there was only one policeman involved, the redhead who was admittedly not the petitioner.

2. The facts belie petitioner's contention that the evidence was insufficient to identify him as one of the participants in the robbery. Four messengers at the trial identified petitioner as the "policeman" who stopped the station wagon at the scene of the robbery. Three messengers testified that they had identified petitioner as a robbery participant when they saw him in public places two years subsequent to the robbery. The testimony on the issue of identity was fully and fairly presented to the jury, whose province it was to decide the issue. See *United States* v. *Dickerson*, 347 F. 2d 783, 784 (C.A. 2).

3. There is no merit to the contention that the pretrial out-of-court identification of petitioner deprived him of due process by denying him a fair and impartial line-up, or that Kreisman's identification initiated the accusatory stage of the proceeding so that the observations by the other messengers should not have been permitted without first affording petitioner a right to counsel. This argument overlooks circumstances that the district court rightly regarded as highly significant—at the time of the identifications the "* * * defendant was not then in custody; the crime was unsolved; no arrests had been made; the matter was still under investigation" (Pet. App. 4a). In substance, petitioner is contending that the agents had an obligation either to arrest him so as to place him within the rule in *Escobedo* v. *Illinois*, 378 U.S. 478, or to advise him to obtain an attorney since a witness was about to observe him for identification purposes. However, "[t]here is no constitutional right to be arrested," *Hoffa* v. *United States*, 385 U.S. 293, 310, and peti-

tioner, mingling with others in public places, had no privilege against being observed by potential witnesses. See *Schmerber* v. *California*, 384 U.S. 757; *Holt* v. *United States*, 218 U.S. 245.[*]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JUNE 1967.

[*] The principles recently enunciated by this Court in *United States* v. *Wade*, No. 334, O.T. 1966, are applicable only to confrontations for purposes of identification conducted after June 12, 1967. *Stovall* v. *Denno*, No. 254, O.T. 1966. Moreover, the viewing here, since it occurred prior to petitioner's arrest, would appear not to be within those principles.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Cal. No. 13967

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS KAPATOS,

Petitioner.

REPLY BRIEF IN ANSWER TO BRIEF FOR THE UNITED STATES OF AMERICA

FRANK A. LOPEZ
Attorney for Petitioner
Office & Post Office Address
133 Schermerhorn Street
Brooklyn, New York 11201
Tel: (212) 625-4387

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Cal. No. 13967

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS KAPATOS,

Appellant.

REPLY BRIEF IN ANSWER TO BRIEF FOR THE UNITED STATES OF AMERICA

In respect to the contention that the petition for a writ of certiorari filed by petitioner was recorded on May 17, 1967; and therefore, out of time under Rules 22(2) and 34(2) of the Rules of this Court, the following circumstances are respectfully set forth:

That on April 10th, 1967, Mr. Justice Harlan extended the time to file the writ of certiorari up to and including May 13, 1967. Petitioner proceeded with appropriate diligence and in good faith.

There was an inordinate delay in the printing of the briefs; and on *May 10, 1967,* petitioner duly mailed forty (40) copies of the brief and included a check in the amount of $100 for the filing of same. See, Exhibit A in the appendix.

That on *May 10, 1967,* three copies of the petition for a writ of certiorari were mailed to the Hon. Thurgood

Marshall, Solicitor General. See, Exhibit B. The receipt thereof, indicating acknowledgment on the *11th day of May, 1967,* is annexed as Exhibit C.

That on *May 10, 1967,* three copies of the petition of certiorari were mailed to the Hon. Robert M. Morgenthau, U. S. Attorney. See, Exhibit D.

Thereafter by telephonic communication, petitioner was informed that the package received from the Post Office arrived on Monday, May 15, 1967, in a damaged condition and that there was no check contained in the package. A letter to that effect was mailed to petitioner. See, Exhibit E.

Thereupon petitioner promptly mailed a money order for $100 via Western Union to defray the cost of filing the petition.

That on May 18, 1967, petitioner received another communication that the original check for $100 was found inside one of the briefs, and the check was returned. See, Exhibit F.

The petition for a writ of certiorari made exclusive reference to the stenographic transcript of the trial record on appeal. By telephonic communication it was indicated that certain supplemental papers were not presented, and they were promptly mailed to the Clerk of the U. S. Supreme Court. An affidavit of service is appended hereto and marked Exhibit G, which indicates that appropriate service was made to the Hon. Thurgood Marshall, Solicitor General, and the Hon. Robert M. Morgenthau, U. S. Attorney, on *May, 10, 1967.*

The In-Court and Show-up Identification

It was urged on Page 5, paragraph 2 of the Memorandum for the U. S. in opposition, that four messengers at the trial identified petitioner as the policeman who stopped the station wagon at the scene of the robbery.

> "Four messengers at the trial identified petitioner as the 'policeman' who stopped the station wagon at the scene of the robbery."

The fact is that Kreisman was the only witness to positively identify the defendant Kapatos in court (T.R. 36).*

In court Figueroa, one of the messengers, testified that the defendant Kapatos:

> "Seems to me he looked like that man" (T.R. 118).

On cross-examination, Figueroa testified in response to the question:

> "Q. So that you can't say positively he is the man, is that right? A. I can't tell you 100%, but many people look like other people and I saw him only that one day" (T.R. 122).

White, another messenger, in respect to the in court identification said:

> "A. I see a man who looks similar to the policeman."

On cross-examination he could not say that he was positively sure (T.R. 160).

Moots, another messenger, testified in court in respect to identifying the defendant Kapatos as follows:

> "A. (After looking around the courtroom) Well, yes, there is one person that I think he looks like, but I am not sure" (T.R. 178).

Two years after the robbery, *on direct examination by the Government-prosecutor,* Kreisman testified that in November of 1965 in the company of two federal agents he identified the defendant Kapatos at the situs at which he worked on Delancey Street underneath the Williamsburgh Bridge in Manhattan (T.R. 37).

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* Reference made to original stenographic transcript of trial record.

Counsel for defendant Kapatos vigorously objected and requested:

> "Mr. Lopez: Your Honor, may I have a continuing objection as to all this testimony of prior identification.
>
> The Court: Yes."

On direct examination by the Government-prosecutor, accompanied by two federal agents of the F.B.I. and Louis Moots, another messenger, Figueroa, identified the defendant Kapatos on Delancey Street underneath the Williamsburgh Bridge, and stated:

> "The day they took me to recognize him, I can only say that the day they took me to recognize him, it seems to me that he looks very much alike to that man who stop us."

Counsel objected to the prior identification, which was overruled (T.R. 120).

White, another messenger, testified *on direct examination by the Government-prosecutor* that in December of 1965, in the company of federal agents, at the location of the Homestead Restaurant in Manhattan, he identified the defendant Kapatos.

Objection was made by counsel for the defense (T.R. 154-155).

Actually, Kreisman was the sole witness who identified the defendant Kapatos in court; and Figueroa, White and Moots were dubious in their in court identifications. However, Kreisman, White and Figueroa made a positive identification of the defendant Kapatos under the aegis of federal agents in an extrajudicial surreptitious confrontation procedure two years after the commission of the crime. The danger implicit in the prior identification procedure is readily apparent that, when Figueroa and White under

sworn testimony, in court, modified their testimony in respect to the identification.

The prior identification testimony was alluded to by the prosecutor in his summation (T.R. 417).

The court, in its charge to the jury in respect to the in court identifications, stated:

> "The law does not require that the identification of the defendant charged be positive beyond any shadow of a doubt. It is required that the identification be established beyond a reasonable doubt."

The prior surreptitious confrontation identifications were used solely to bolster and give strength to Kreisman's in court identification and the dubious identifications made by White and Figueroa.

Petitioner respectfully urges that the surreptitious prior confrontation procedure in totality with the other circumstances of the case were violative of the Due Process Clause of the Fifth Amendment to the U. S. Constitution.

In *U. S.* v. *Billy Joe Wade* (#334, October Term, 1966, decided June 12, 1967), it was made crystal clear that the improper prior identification procedure out of court, pretrial, necessitates counsel protection. However, the *Wade* case and the *Gilbert* v. *California* case (#223, October Term, 1966, decided June 12, 1967), and the *Stovall* v. *Denno* case (#254, October Term, 1966, decided June 12, 1967), explicitly established that counsel requirement was not retroactive. However, in *Stovall* v. *Denno, supra,* consideration of the Due Process Clause was appropriate. See, *Palmer* v. *Peyton,* 359 F. 2d 199. The Due Process Clause of the Fourteenth Amendment was considered in the *Stovall* case and extraordinary and exigent circumstances were controlling, which certainly did not exist in the instant case.

It is respectfully reiterated that the defendant Kapatos was under surveillance for approximately two years and photos of him were shown to the messengers intermittently; and finally in November of 1965 the witness-messengers Kreisman, Figueroa, White and Moots were brought in the company of federal agents to confront the defendant Kapatos surreptitiously for the express purpose of identification. What specifically transpired in this area of identification has not been sufficiently reflected by the record.

The onus of elucidation cannot reflect upon counsel for the defendant, but militates against the omission by the prosecutor for the government. We can only glean from the record the testimony of Mullett presented by the Government-prosecutor as to what probably took place at the extrajudicial identification procedure. See, Page 38-39 of the petition for certiorari.

In this case the pretrial surreptitious confrontation identification procedure introduced on *direct evidence* by the prosecutor grievously tainted the in court identification and unduly gave impetus to Kreisman's credibility and enhanced the effect of the dubious identifications made by Figueroa, White and Moots.

It was held in the *Wade* case in an identification situation where there was indeed a *line-up*:

> "In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."

It was also effectively stressed in Justice Brennan's opinion, paragraph 4, in the *Wade* case:

> "But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly

riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."

The gravamen of the instant case is that there was no line-up accorded the defendant when a fair line-up procedure was readily available and that the federal agents circumvented a line-up procedure.

It is significant that in the *Wade* case, as well as the *Gilbert* case, both were accorded line-up procedures.

It has been urged in the memorandum, page 5, that:

"(t)here is no constitutional right to be arrested," citing *Hoffa* v. *U. S.*, 385 U.S. 293, 310.* In this case the peculiar circumstances are that in November of 1965, at the extrajudicial confrontation identification procedure, Kreisman had positively identified the defendant Kapatos. Subsequently, accompanied by Moots, Figueroa identified Kapatos at Delancey Street under the Williamsburgh Bridge. In December of 1965, White identified the defendant Kapatos in front of the Homestead Restaurant in Manhattan. Although Kreisman had made a positive identification, there was no arrest, nor was there an arrest when Figueroa identified the defendant subsequently. There was no arrest made after White had identified the defendant Kapatos in December of 1965.

Kapatos was indicted on January 14, 1966, and *was arrested on January 17, 1966,* but whether Kapatos was immediately arrested or there had been an inordinate delay does not reflect upon the fundamental need of a fair and impartial line-up, particularly when such requisite policy exists in the federal criminal administration.

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* ". . . there may be an occasion when a pre-arrest delay may deprive a defendant of a constitutional right if there is a 'showing that the delay . . . was prejudicial or part of a deliberate, purposeful and oppressive design for delay' U. S. v. Rivera, 346 F. 2d 942, 943 (2d Cir. 1965) . . ."

In Justice Black's, dissenting in part and concurring in part, in *U. S. v. Wade, supra,* paragraph 3, pertaining to the instant case, stated:

> "I would reverse WADE'S conviction without further ado had the prosecution at trial made use of his lineup identification either in place of courtroom identification or to bolster in a harmful manner crucial courtroom identification."

It is respectfully submitted that if the *Wade* and *Gilbert* cases hadn't been concluded as being not retroactive, the principles enunciated therein would certainly apply to the instant case; therefore, petitioner cannot urge that he should have been accorded the right to counsel under the Sixth Amendment to the U. S. Constitution. However, with equal efficacy, petitioner urges under the totality of the evidence adduced at the trial, that he has been denied Due Process of Law under the Fifth Amendment to the U. S. Constitution.

The impropriety of the prior surreptitious confrontation identification is apparent in this case. The following criteria for ascertainment as to whether the prior identification confrontation offends the Due Process Clause of the Fifth Amendment to the U. S. Constitution, are set forth seriatim:

1. There was a lapse of two years between the alleged act and the show-up confrontation procedure;
2. The defendant Kapatos was not known to the messengers.
3. The inconsistencies between the statements made by the messengers to the police authorities at the time of the crime incident and their subsequent identifications.
4. Positive diversionary assertions by the prosecution to the jury without a scintilla of evidentiary foundation.

5. Four witnesses testified that the man dressed as a policeman was not the defendant Kapatos.

6. The showing of photographs of the defendant Kapatos, which had negative results preceding the show-up identification.

7. The show-up identification procedure in failing to grant the defendant a fair and impartial line-up when the federal authorities could have readily accorded him such line-up consonant with their invariable policy.

8. The glaring inconsistencies in the court testimony of the messengers concerning the circumstances surrounding the identification during the crime incident.

In respect to the opposition on Page 6, there is not an iota of evidence reflecting that the defendant Kapatos was identified in the extrajudicial confrontation identification procedure, "mingling with others in public places."

Fallacious Prosecutorial Testimony

It is of paramount significance that on November 8, 1963, the date of the alleged crime incident, Kreisman had given Federal Agent Edwin Peter Krieger a statement:

> "Kreisman stated that the individual dressed as a policeman was a white male, 35 to 40 years old, and that the other individuals wore masks and another one had on sunglasses. They were all described as white males, 30 to 40 years old, and one of the individuals was wearing blue coveralls and stripes" (T.R. 336).

This recorded description of the perpetrators of the crime pertinently omitted to indicate that there were two men dressed as policeman involved in the crime incident.

Nevertheless, at trial, Kreisman testified that he had observed that the driver of the black sedan wore a police uniform (T.R. 32).

No other witness among the messengers had observed that the driver of the black sedan wore a police uniform. However, the fact that Kreisman merely testified that the driver of the black sedan wore a police uniform and gave no further description in any respect concerning the driver, it was unjustifiable for the government-prosecutor to positively assert in his opening address:

> "You will learn that the man who stayed with the station wagon, the man who was dressed as a police officer, was not the man who originally got out and ordered the station wagon to stop, but was the driver of that unmarked car also wearing a policeman's uniform" (T.R. 13).

In his summation he unequivocally *testified*:

> "And I think the Government has proved beyond any doubt whatever that the man that Rossi and Carey and the vendor were looking at was the redheaded man who was undoubtedly the other man in this robbery" (T.R. 427).

This prosecutorial testimony effectively diverted the jury from assessing the testimony of the witnesses, Mullett, Carey, Rossi and Manessis, who categorically testified that the defendant Kapatos was not the man dressed as a policeman. *Berger* v. *U. S.*, 295 U.S. 78, 88. See, also footnote #4, Mr. Justice White's opinion in *U. S.* v. *Billy Joe Wade*, *supra*.

The prosecutor in effect asserted that the man who was the driver of the black sedan had emerged from the black sedan and apparently switched places with the other man dressed as a policeman; and that he further tried to start the station wagon, was frustrated, then endeavored to solicit the aid of Mullett and was observed by Carey and Rossi, and finally abandoned the station wagon and walked west where he was observed by the frankfurter vendor Manessis.

There is absolutely no evidence adduced at the trial to remotely substantiate such contentions.

Upon the foregoing assertions and the petition for a Writ of Certiorari, it is respectfully prayed that the writ of certiorari be granted in the interest of fundamental justice.

Dated: June of 1967.

Respectfully submitted,

FRANK A. LOPEZ
Attorney for Petitioner
Office & Post Office Address
133 Schermerhorn Street
Brooklyn, New York 11201
Tel: (212) 625-4387

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APPENDIX

Exhibit A

May 10, 1967

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Dear Sir:

Re: Kapatos v. U.S.
#30967, October Term

Enclosed herewith please find forty (40) copies of the Petition for a Writ of Certiorari on behalf of Thomas Kapatos.

Also enclosed herewith please find my check for $100 for the filing of same.

An Order Extending the time to file petition to May 13th is also enclosed.

Most respectfully yours,

FRANK A. LOPEZ

FAL:mnp
Encls. (42)

No. 355392

Addressed for Delivery (*P.O. and State*)
Wash D C

Postage	95¢	Postmark of Mailing Office
Insurance Fee	30¢	
Special Delivery	¢	Brooklyn, N. Y.
Special Handling	¢	May 10, 1967
Return Receipt	10¢	Sta. No. 64
Restricted Delivery	¢	

☐ Fragile ☐ Perishable ☐

SENDER: Enter name and address of addressee on other side and read information regarding indemnity.

Postmaster (*By*)

POD Form 3813P, June 1963

Receipt for Insured Parcel

Exhibit B

May 10, 1967

Hon. Thurgood Marshall
Solicitor General
Department of Justice
Washington, D.C.

Dear Sir:

Re: Kapatos v. U.S.
#30967, October Term

Enclosed herewith please find three (3) copies of the Petition for a Writ of Certiorari on behalf of Thomas Kapatos.

Most respectfully yours,

FRANK A. LOPEZ

FAL:mnp
Encls. (3)

Exhibit C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1396

THOMAS KAPATOS

vs

UNITED STATES OF AMERICA

Service of three copies of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit is acknowledged this 11th day of May, 1967.

THURGOOD MARSHALL
Solicitor General

Original Filed in the United States Supreme Court

Exhibit D

May 10, 1967

Hon. Robert M. Morgenthau
U.S. Attorney's Office
U.S. Courthouse
Foley Square
New York, New York

Dear Sir:

Re: Kapatos v. U.S.
#30967, October Term

Enclosed herewith please find three (3) copies of the Petition for a Writ of Certiorari on behalf of Thomas Kapatos.

Yours very truly,

FRANK A. LOPEZ

FAL:mnp
Encls. (3)

Exhibit E

Office of the Clerk

SUPREME COURT OF THE UNITED STATES

Washington, D. C. 20543

May 17, 1967

Frank A. Lopez, Esq.
133 Schermerhorn Street
Brooklyn, New York 11201

Re: Kapatos v. United States
No. 1396, October Term, 1966

Dear Mr. Lopez:

Your letter of May 15th enclosing the certified record and service in the above-entitled case were received today and the case was docketed today as No. 1396, October Term, 1966.

As you were advised by telephone, the package containing the petitions was received from the Post Office in damaged condition on Monday, May 15, 1967, and there was no check contained in the package.

Enclosed is an appearance form to be completed and returned to this office. I am also enclosing our form to be used for advising opposing counsel of the docketing of this case.

Yours very truly,

John F. Davis, Clerk
By JENNIE H. LAZOWSKI
Jennie H. Lazowski (Miss)
Assistant

Enclosures

Exhibit F

Office of the Clerk

SUPREME COURT OF THE UNITED STATES

Washington, D. C. 20543

May 18, 1967

Frank A. Lopez, Esq.
133 Schermerhorn Street
Brooklyn, N. Y. 11201

Re: Kapatos v. United States
No. 1396, Oct. Term, 1966

Dear Mr. Lopez:

Your letter of transmittal and check for $100 were found today inside one of the petitions in the above-entitled case.

As you requested, the check is returned herewith.

Yours very truly,

John F. Davis, Clerk
By JENNIE H. LAZOWSK.
Jennie H. Lazowski (Miss)
Assistant

Enclosure

Exhibit G

Affidavit of Service

SUPREME COURT OF THE UNITED STATES OF AMERICA

Thomas Kapatos,

Petitioner,

—against—

United States of America,

Respondent.

State of New York,
County of Kings, ss.:

Mary Priolo, being duly sworn, deposes and says:

That your deponent is over the age of 18 years, is not a party to the action, and resides at 145 Minna Street, Brooklyn, New York 11218.

That on the 10th day of May, 1967, your deponent served the within briefs in this action upon the Hon. Thurgood Marshall, Solicitor General, at Department of Justice, Washington, D.C. and the Hon. Robert M. Morgenthau, U.S. Attorney, at U.S. Courthouse, Foley Square, New York, New York, (three (3) copies each), by depositing same enclosed in a postpaid properly addressed wrapper, in a post office box on the corner of Schermerhorn And Smith Streets, Brooklyn, New York, which is the official depository under the care and exclusive cusotdy regularly maintained by the U.S. Post Office in the State of N.Y.

Mary Priolo

Sworn to before me this
15th day of May, 1967

Frank A. Lopez
Notary Public, State of New York
No. 24-7596075
Qualified in Kings County
Commission Expires March 30, 1964